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No. 99-166

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District Of Columbia Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the government may override a witness' Fifth Amendment privilege, compel the witness to produce incriminating documents under statutory immunity, and still use those documents to build a criminal case against him.

2. Whether this Court should address that question in a case, like this one, in which the court of appeals declined to decide it in the absence of a factual record, to be developed on remand; and in which no factual record now will ever be developed because following remand the case was resolved by plea agreement.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Introduction.

a. The court of appeals' opinion on the Fifth Amendment's application to document subpoenas is completely faithful to this Court's decisions in *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605 (1984). *Fisher* and *Doe* hold that the Fifth Amendment's protections apply to a subpoena for non-corporate documents unless the existence of the documents

and the witness' possession of them is a "foregone conclusion." The court of appeals concluded that to fall within the foregone conclusion exception, the government must show that it already knew of the documents' existence with "reasonable particularity," and remanded for a hearing on that issue. The court of appeals' decision on this point is extraordinarily thorough, is fully consistent with *Fisher* and *Doe*, and is at the center of gravity of the case law in other circuits. There is no reason to review it.

b. The court of appeals also properly rejected the Independent Counsel's broad position that — even when the privilege does apply — the government can *always* override the witness' claim of privilege, compel production of documents under a grant of statutory immunity, and then use those very documents to prosecute the witness. In those cases in which the witness is compelled under immunity to disclose the very existence of the documents, the Independent Counsel's position is hopelessly inconsistent with this Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972), a case barely discussed at all in the petition for certiorari.

c. Moreover, the posture of this case makes it a peculiarly inappropriate vehicle for consideration of the scope and effect of an immunity order in the context of a document subpoena. The court of appeals below did not decide what the scope and effect of the immunity order was. Instead, it remanded to the district court so that it might hold a hearing, develop a factual record, and decide both the scope of Hubbell's privilege and the resulting scope and effect of the immunity order.

However, no hearing was held, no record has been made and the lower courts have not determined the scope and effect of the immunity order. Instead, the case was resolved by a plea agreement under which Mr. Hubbell pleaded to a

misdemeanor and received a sentence of no jail and no fine. Because the plea is conditional and will be set aside and all charges dismissed unless this Court grants the petition and reverses, the case is not moot. But lacking a record exploring the nature of the *testimony* involved in complying with this subpoena, this case presents a very poor vehicle for addressing the issues sought to be raised by the Independent Counsel.

2. Facts.

On October 31, 1996, at the outset of the investigation leading to the indictment in this case, the Office of Independent Counsel served a subpoena *duces tecum* on Mr. Hubbell calling for a wide range of financial and tax documents relating to himself, his sole proprietorship, and his wife and children. Fearing that the Independent Counsel would use any documents he produced to build a criminal case against him, Mr. Hubbell asserted his Fifth Amendment privilege against self-incrimination and declined to state what if any responsive documents existed. Pet. App. 25a-26a.

The Office of Independent Counsel accepted Mr. Hubbell's Fifth Amendment claim. It obtained an immunity order under 18 U.S.C. § 6003, and compelled Mr. Hubbell to produce any responsive documents under protection of immunity. Then the Independent Counsel used those documents to develop the various tax-related charges alleged in the indictment.[1]

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1 Indeed, the Independent Counsel's office concedes here as it did below that it "made substantial use of [the documents'] contents in the investigation that led to the indictment." Pet. 4.

3. District Court Proceedings.

Contending that the indictment was based on evidence to which the Independent Counsel had been led by Mr. Hubbell's immunized testimony, Mr. Hubbell moved to dismiss the indictment. In opposing the motion in the district court, the Independent Counsel did not challenge Mr. Hubbell's Fifth Amendment privilege claim.[2] Instead, the Independent Counsel argued that it could override Mr. Hubbell's Fifth Amendment privilege with a grant of immunity and still use the documents to build a case against Mr. Hubbell. The district court rejected that argument as inconsistent with *Kastigar*, and dismissed the indictment. The district court also addressed a question not directly raised by the Independent Counsel, and found that the Independent Counsel had not shown that the existence of the "documents or their contents was a 'foregone conclusion.'" Pet. App. 134a.[3]

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[2] Indeed, in its brief in the district court, the Office of Independent Counsel wrote:

> For purposes of this motion there is no factual dispute. Moreover, the legal dispute is limited. Both parties agree an individual can respond to a subpoena commanding business records by asserting his privilege against self-incrimination.

JA 311 (citations to "JA" refer to portions of the joint appendix in the court of appeals not included in the petitioners' appendix). *See also* JA 303.

[3] The Independent Counsel's claim in its petition that "the district court did not dispute the government's assertion that it already knew that Hubbell maintained records of the types subpoenaed" (Pet. 4) is thus incorrect.

4. Court of Appeals Proceedings.

On appeal, the Independent Counsel raised two issues. First, the Independent Counsel argued that Mr. Hubbell had enjoyed no valid Fifth Amendment privilege in the first place, because compliance with the subpoena involved no "testimony." Second, the Independent Counsel argued that he could, in any event, displace the Fifth Amendment privilege with an immunity order, and still use the documents against Mr. Hubbell.

The court of appeals addressed both issues. First, faithfully following the Supreme Court's decisions in *Fisher* and *Doe*, the court observed that the Fifth Amendment privilege applies to document subpoenas because compliance generally involves "testimony" as to existence, possession, or authenticity of the documents produced. *United States v. Hubbell*, 167 F.3d 552, 567-68 (D.C. Cir. 1999) (Pet. App. 1a, 31a-32a.) Still following *Fisher*, the court of appeals noted that where existence and possession are a "foregone conclusion," no testimony is involved. In such a case, existence and possession are a given, and the government is not relying on the witness' "truthtelling" to secure the evidence it seeks. Pet. App. 34a. The court then reviewed the prior decisions of other circuits applying the "foregone conclusion" exception, and concluded that in order to fall within the scope of that exception, the government must show that it knew with "reasonable particularity" of the existence of the subpoenaed documents and the defendant's possession of them before issuing the subpoena. Pet. App. 39a-41a; 51a-55a; 59a.

Concluding that the district court had not applied the "reasonable particularity" standard, the court of appeals

vacated the district court's order dismissing the indictment.[4] And because the record was undeveloped on the state of the Independent Counsel's pre-subpoena knowledge as to the documents' existence, the court of appeals remanded the case to the district court to conduct a hearing as to the extent of that knowledge; and directed the district court to apply the "reasonable particularity" standard to the facts as developed at that hearing. Pet. App. 23a; 71a.

Second, with respect to the scope and effect of immunity order in *this* case, the court of appeals held that the extent of its protections would turn on the nature of the *testimony* involved in Mr. Hubbell's act of producing the documents. The court of appeals reasoned that that could not be determined until the record was developed further on remand. Pet. App. 65a-66a.

The court of appeals rejected the government's broader claim that, in the document subpoena context, the government may *always* override the Fifth Amendment privilege with a grant of statutory immunity and still use the documents to prosecute the witness, so long as the jury is not told where the documents came from. The court concluded that *Kastigar* ruled that result out. Pet. App. 66a-67a. It reasoned that where the witness is compelled under immunity to reveal the *existence* of incriminating evidence, and where the government gains access to that evidence as a result, that evidence is tainted. Pet. App. 70a-71a. This follows directly from *Kastigar*, which held that a statutory immunity order must leave "'the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed

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4 The court also emphasized that the issue on remand was whether the Independent Counsel knew of the existence of the documents, not the nature of their contents. Pet. App. 36a n.23; 60a.

the Fifth Amendment privilege.'" Pet. App. 65a (quoting from *Kastigar*, 406 U.S. at 462).

The full court of appeals declined the Independent Counsel's request to rehear the case *en banc*. Pet. App. 142a.

5. Proceedings Following Remand.

Following issuance of the mandate, the case was remanded to the district court for the anticipated hearing on the question of the Independent Counsel's prior knowledge of the existence of the subpoenaed documents. Pet. App. 60a-62a.

However, the contemplated hearing never occurred. Instead, Mr. Hubbell and the Office of Independent Counsel entered into a plea agreement resolving this case as well as another one.[5] This case was resolved by a plea, which Mr. Hubbell entered to a superseding information charging a tax misdemeanor. The plea is conditional, and will be set aside and the information dismissed unless this Court grants the petition and reverses the court of appeals' decision in a way that would have permitted the Independent Counsel's office to have proceeded with its case. Pet. 8. Under the plea agreement, Mr. Hubbell received a sentence of probation with no incarceration, and no fine.

REASONS FOR DENYING THE WRIT

The court of appeals' decision on the application of the Fifth Amendment privilege to subpoenas *duces tecum* is faithful to *Fisher* and *Doe*, and consistent with circuit law interpreting those decisions. There is no reason to review that decision.

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5 *See* Pet. at 7-8.

The court of appeals also correctly held that the scope and effect of the immunity order would depend on what testimony was involved in complying with the subpoena. This issue was to be determined on remand after a hearing was held and a factual record developed. But the case was resolved by plea; no proceedings on remand ever occurred; and the scope and effect of the immunity order thus were not determined by the courts below.

The only ruling the court of appeals made on the immunity issue was its rejection of the government's absolute position that it could always use documents produced under immunity so long as it did not disclose to the jury where they came from. But when the government learns of the *existence* of incriminating documents by compelling their disclosure under immunity, the government's position is hopelessly at odds with *Kastigar*. The court of appeals' decision rejecting it is plainly correct and warrants no further review.

I. The Court of Appeals' Decision on the Foregone Conclusion Question Is Squarely Within this Court's Holdings in *Fisher* and *Doe*

It has long been recognized that the Fifth Amendment will generally apply to a subpoena calling for a witness to produce potentially incriminating documents, or other physical evidence, because such a subpoena constitutes "process relying on [the witness'] moral responsibility for truth telling." 8 J. Wigmore, *Evidence* § 2264, at 379 (1961). As this Court explained in *Fisher*, compliance with such a subpoena may call upon the witness tacitly to testify truthfully to what documents responsive to the subpoena exist and are in his possession, and whether they are authentic. 425 U.S. at 410-11.

Compliance does not always involve testimony as to existence and possession, however. In *Fisher*, the documents had been created by accountants, who were not themselves asserting any Fifth Amendment privilege. The accountants had been interviewed by the IRS, and then *concededly* transferred their documents to the taxpayers, who in turn had *concededly* transferred them to their lawyers.[6] There was no question as to the existence of the documents or who possessed them. This Court held that existence and possession, under the facts of the case, were beyond dispute — a "foregone conclusion." And the *Fisher* Court held that where existence and possession are a foregone conclusion, compliance involves no "testimony" about what documents exist — that is already known — but solely involves surrender of the known documents. *Id.*[7]

In *Doe*, this Court held that the government may not subpoena business records from a sole proprietor over his

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6 *Fisher*, 425 U.S. at 393-94. The *Fisher* opinion dealt with two cases involving — in this respect — identical fact patterns. *See United States v. Fisher*, 500 F.2d 683 (3d Cir. 1974); *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974).

7 In his petition for certiorari at 17, the Independent Counsel argues that *Fisher* found existence of documents to be a foregone conclusion even though the government had no specific prior knowledge of the documents' existence. This is a brand new and incorrect interpretation of *Fisher*. Indeed, in its own brief to the court below, the Independent Counsel wrote of *Fisher* that "it held that the existence of documents whose existence had been *stipulated* by the taxpayer was a 'foregone conclusion.'" *See* Appellant's Br. at 43 (emphasis added). *See also In re Sealed Case*, 832 F.2d 1268, 1280 (D.C. Cir. 1987) ("In *Fisher*, the Supreme Court found the existence and location of the taxpayers' records a foregone conclusion, but it could hardly have reached the opposite result inasmuch as the taxpayers had already *admitted* these points.")

Fifth Amendment objection; and affirmed the determination by the lower courts that the government had not sustained its burden of proving that the existence of the subpoenaed documents was a foregone conclusion. 465 U.S. at 617. The government in *Doe* argued specifically that compliance with a subpoena for standard business records is neither testimonial nor incriminating. *See* Appellees' Br. in *Doe* at 30. But this Court did not accept that argument. It sustained the application of the privilege and held that the government could only compel production with a grant of statutory immunity. 465 U.S. at 617.

Thus, in case after case, courts of appeals around the country have required the government to demonstrate particularized knowledge, or more[8], before they will find the "foregone conclusion" exception to apply. These cases are collected and analyzed exhaustively in the court of appeals' opinion below. Pet. App. 52a-55a; 59a. And the court of appeals' decision adopting the reasonable particularity standard is at the center of those other circuits' interpretations of *Fisher*, and entirely consistent with *Fisher* itself.

The Independent Counsel cites one case — *United States v. Fishman*, 726 F.2d 125 (4th Cir. 1983) — in support of its position that it may subpoena *business records* from any businessman, even if the government is without particularized knowledge as to what documents the businessman possesses. But *Fishman* was decided shortly before this Court's decision in *Doe*, and is inconsistent with the holding in *Doe*. *Doe* involved a subpoena of standard

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8 In the court of appeals in *Doe*, the Third Circuit required the government to demonstrate knowledge of existence and possession to "a certainty." *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 335 (3d. Cir. 1982), *cert. granted sub nom. Doe v. United States*, 465 U.S. 605 (1984).

business records from a businessman, and the Court sustained the privilege. *Fishman* is thus of no continuing precedential value.

There is no reason to review the court of appeals' decision regarding the foregone conclusion standard.

II. The Court of Appeals Correctly Applied *Kastigar*

Subject to the strictures of the foregone conclusion doctrine, a witness has a valid Fifth Amendment right not to disclose to the government whether a potentially incriminating document or item of physical evidence exists. This privilege applies to *oral* testimony disclosing the existence and location of an incriminating document or thing; and it applies to the *implicit* testimony involved in truthfully responding to a subpoena *duces tecum*. That is the teaching of *Fisher* and *Doe* and their progeny.[9]

If the government wishes to compel the witness, over a claim of privilege, to inform it of the existence of such an incriminating object or document so that the government may obtain possession of it, the government must provide the witness immunity. *See Doe*, 465 U.S. at 617. And if the government compels the witness under *immunity* to provide it with access to the document or object, the immunity statute will forbid the government from using the document or

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9 *See also Doe v. United States*, 487 U.S. 201, 209-10 n.8 (1988) ("Petitioner has articulated no cogent argument as to why the 'testimonial' requirement should have one meaning in the context of acts, and another meaning in the context of verbal statements"); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990) (definition of testimonial communication "applies to both verbal and nonverbal conduct").

object against the witness. That is the law of immunity and the teaching of *Kastigar*.

In arguing the contrary, the Office of Independent Counsel makes hardly any mention of *Kastigar* at all; and finds itself adopting the fanciful suggestion that a prosecutor should be able to use the documents to the same extent as "if the documents appeared in the grand jury room or in his office unsolicited and unmarked, like manna from heaven." Pet. 7. But the documents in this case did not appear in the grand jury like manna from heaven. Instead, Mr. Hubbell had them in his custody and — depending on the outcome of the hearing on remand — had a Fifth Amendment right not to inform the government whether he had them or not. The documents arrived in the grand jury because Mr. Hubbell's Fifth Amendment privilege was overridden by an order of statutory immunity — not by act of God. Without the immunity order, and Mr. Hubbell's truthful response — a response given only under immunity, acknowledging that he had the documents — the Independent Counsel and the grand jury would not have had access to the documents. *Kastigar* forbids their use under these circumstances to build a case against Mr. Hubbell.[10]

The Independent Counsel reasons that Mr. Hubbell was not compelled to write the documents, and that the

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10 The Independent Counsel asserts that, had the case proceeded to trial, he would have needed neither to introduce the subpoenaed documents into evidence nor to establish their existence or possession by Mr. Hubbell to prove the charges in the indictment. *See* Pet. at 10, 12-15. This, of course, is utterly irrelevant. Both the Fifth Amendment and the immunity statute prohibit *any* use of compelled testimony or its fruits to build a case against an accused — not merely such use at trial.

contents of the documents are therefore not "privileged."[11] This is true enough; but this reasoning does not get the Independent Counsel very far. As the court of appeals for the D.C. Circuit said in *In re Sealed Case*, 791 F.2d 179 (D.C. Cir.) (Scalia, J.), *cert. denied*, 479 U.S. 924 (1986):

> The flaw in this reasoning is that the fact that the contents of the tapes are *unprivileged* does not mean that they will necessarily remain *untainted*. If the government prosecutes the [witness] in the future, it will have to meet the 'heavy burden,' *Kastigar*, 406 U.S. at 461, of proving that all evidence it seeks to introduce is untainted by the immunized act of production.

791 F.2d at 182 (emphasis in original).

Justice Scalia's point is both simple and incontrovertible. Under the immunity statute and *Kastigar*, protection is given to more than just the privileged testimony itself. Protection is given, as it must be, to other evidence (including physical evidence) which is not itself "privileged," but to which the government is led by the compelled testimony.

Thus, if a witness were compelled to give testimony under immunity disclosing the whereabouts of a body, a

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11 The proposition that *contents* of documents are not privileged is an important one. It means that a person's writings are subject to seizure by warrant issued on probable cause (that is the holding of *Andresen v. Maryland*, 427 U.S. 463 (1976)); and that a person's writings may be subpoenaed from a third party (that is the holding of the first part of *Fisher v. United States*, 425 U.S. 391, 396-401 (1976)).

murder weapon, or an incriminating document, the prosecution would be forbidden from using these items of evidence against the witness, unless it could prove that it was led to them by a legitimate independent source. This is true not because these items are "privileged"; they are not. It is true because they would be *tainted* by the compelled testimony. These items constitute evidence *derived from* the immunized testimony within the meaning of *Kastigar*.[12]

The Independent Counsel nonetheless cites one circuit court decision that could be said to conflict with the decision of the court below. *United States v. Neely*, No. 94-5107, 1996 WL 60329 (4th Cir. Feb. 13, 1996). But the *Neely* case is an unreported decision, and it does not even discuss *Kastigar*. The Independent Counsel cites three other cases, but none conflicts. One involves corporate documents as to which there is no Fifth Amendment privilege[13]; and two do not involve the question what use can be made of items produced under immunity at all.[14]

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12 The fact that a document was written voluntarily *prior* to the subpoena is largely irrelevant to the analysis. All tainted physical evidence pre-exists the testimony that led the government to that evidence. The evidence becomes tainted not because the government forced the witness to create it, but because the government compelled the witness to disclose its existence or lead the government to it.

13 *United States v. Municipal Bond & Collection Servs., Inc.*, 810 F.2d 46 (3d Cir. 1987).

14 *In re Proceedings Before the Aug. 6, 1984 Grand Jury*, 767 F.2d 39 (2d Cir. 1985) (holding that non-corporate records must be produced when immunity is conferred; not addressing question of their later use); *In re Grand Jury Proceedings on Feb. 4, 1982*, 759 F.2d 1418, 1420 (9th Cir. 1985) (immunity not involved at all).

III. The Procedural Posture of the Case Makes It a Poor Candidate for Review

It is true beyond doubt that *Kastigar*'s prohibition on use of evidence directly or indirectly derived from immunized testimony applies in the context of the immunized production of documents. This Court made that clear in *Braswell v. United States*, 487 U.S. 99 (1988). Referring specifically to document subpoenas, the Court said:

> All of the evidence obtained *under a grant of immunity* to the custodian may of course be used freely against the corporation, but if the Government has any thought of prosecuting the custodian, a grant of act of production *immunity* can have serious consequences. Testimony obtained pursuant to a grant of *statutory use immunity* may be used neither directly or derivatively. 18 U.S.C. § 6002; *Kastigar v. United States*, 406 U.S. 441 (1972). And "[o]ne raising a claim under [the federal immunity] statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Id.* at 461-62.

Id. at 117 (emphasis added).

Since the *Braswell* Court held that the Fifth Amendment did not apply at all to the corporate documents at issue there, it had no occasion to adjudicate the precise effect of an immunity order on their production. It stands to

reason, however, that the scope of the immunity will turn on the nature of the testimony implicit in complying with the subpoena. Here, because there was no hearing on remand and no record made with respect to the foregone conclusion issue, it has never been determined whether Mr. Hubbell was compelled to disclose the very existence of the documents or whether, instead, the Independent Counsel already knew about them.

The court of appeals accordingly did not determine the effect of the immunity order. It explicitly left that issue open until the district court could determine on remand what the nature of the compelled testimony was: did Mr. Hubbell testify to the existence and his possession of the documents, just their authenticity, or neither?

However, because the Independent Counsel and Mr. Hubbell entered into a plea agreement, no hearing was held. No record was made. Thus, no decision on the effect of the immunity was reached by the lower courts.

The posture of this case makes it a poor candidate for review.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

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